

1 IN THE UNITED STATES DISTRICT COURT
2 FOR THE WESTERN DISTRICT OF TEXAS
3 WACO DIVISION

5 DAEDALUS BLUE, LLC,) (
6 PLAINTIFF,) (CIVIL ACTION NO.
7) (6:20-CV-1152-ADA
8 VS.) (WACO, TEXAS
9) (OCTOBER 18, 2021
10 MICROSOFT CORPORATION,) (OCTOBER 18, 2021
11 DEFENDANT.) (2:32 P.M.

12 | CLAIM CONSTRUCTION HEARING

13 BEFORE THE HONORABLE JUDGE ALAN D ALBRIGHT

UNITED STATES DISTRICT JUDGE

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1 THE COURT: Good afternoon, everyone.

2 Thank you very much for accommodating me and
3 moving this hearing up. I appreciate it.

4 Katherine, if you'd call the case, please.

5 COURTROOM DEPUTY: Certainly. The Court calls
6 Waco 6:20-CV-1152, Daedalus Blue, LLC, vs. Microsoft
7 Corporation for a Markman hearing.

8 THE COURT: If I could have announcements from
9 counsel, please.

10 MS. DE MORY: Sure. Good afternoon, Your Honor.
11 This is Denise De Mory from Bunsow De Mory. With me in the
12 room is Michael Flynn-O'Brien, who will be doing the
13 primary argument this afternoon. On the phone should be
14 Mr. Horton, our local counsel, and our client, principal of
15 Daedalus Blue, Ed Gomez.

16 THE COURT: Mr. Horton is going to be doing some
17 arguing today?

18 MS. DE MORY: He will not. He's just -- I was
19 just introducing him.

20 THE COURT: Okay. I was -- this was going to be a
21 first. I was looking forward to it.

22 Anyone else for Plaintiff?

23 MS. DE MORY: Other team members are -- are on the
24 line, Robin Curtis, Brenda Entzminger, Jen Gilbert, and
25 Nick Mancuso.

1 THE COURT: Okay. And for Defendant, Microsoft?

2 MR. SHELTON: Good afternoon, Your Honor. We have
3 a client representative, Mark Taylor, in-house counsel for
4 Microsoft Corporation. And I am Barry Shelton, not your --
5 not my first time here, from Shelton Coburn, LLP. And for
6 the Orrick law firm, we have Don Daybell, Jacob Heath, and
7 Jared Bobrow.

8 Mr. Bobrow will take the first term, and

9 Mr. Daybell will take the other three terms.

10 Thank you, Your Honor.

11 THE COURT: Very good. Give me one second to get
12 organized and to get the claim constructions up.

13 Okay. As I understand it, what we're primarily
14 going to be discussing today are means-plus-function
15 claims.

16 At this point, I probably know enough about
17 means-plus-function claims I don't need a tutorial on it.

18 And so the first claim term, as I understand it,
19 is "service class rule."

20 And I'll hear from the Defendant on that to start
21 with.

22 MR. BOBROW: Very good, Your Honor. This is Jared
23 Bobrow. Thank you. So --

24 THE COURT: Mr. Bobrow, welcome back to my court.
25 It's always a pleasure.

1 MR. BOBROW: It's a pleasure to be here, Your
2 Honor. Thank you.

3 So why don't we just jump right in and go to Slide
4 5?

5 And unlike the balance of the terms, Your Honor,
6 the "service class rule" term is not a means-plus-function
7 term, just a three-word phrase. And the Court having
8 reviewed the record at all, its preliminary construction is
9 that a service class rule is a rule which uses file
10 attributes to determine a service class for a file.

11 And what we propose, Your Honor, is a fine-tuning
12 of this or just a modest adjustment of this.

13 Why don't we go to Slide 7, and we can show you
14 what we propose.

15 What we propose to do is to take that phrase just
16 as it was in the preliminary construction but simply insert
17 the word "automatically" before the word "determine." So
18 the construction would be a rule which uses file attributes
19 to automatically determine a service class for a file.

20 Now, this modification or adjustment to the
21 Court's preliminary construction simply stems from what the
22 patent applicants said during prosecution of the patent in
23 order to get their patent issued, in order to get their
24 claims allowed.

25 Why don't we go to Slide 9, please, Mr. Daybell?

1 And in the file history, you might recall, Your
2 Honor, that during the prosecution of this patent, all of
3 the claims of this patent stood rejected based upon an
4 obviousness combination that the examiner had put forth,
5 and all of the claims were rejected.

6 In response to that, the applicants submitted a
7 response to that, and they tried to overcome the
8 obviousness rejection. And in doing so, they distinguished
9 the prior art that the examiner had found on the grounds
10 that the rules, as they called them, there of -- in all of
11 the claims, Claims 1 through 27, they said that those are
12 used for automatically associating policy rules with files.

13 So the discussion of the prior art spans over two
14 pages of the file history. And you can see that in
15 connection with distinguishing the prior art, the applicant
16 said that in contrast to that art, the present invention is
17 dealing with automatically associating a certain policy
18 with a file management of the file in the storage system.

19 And they went on to say that those policies that
20 are automatically associated include rules which use file
21 attributes to determine the service class for the file.

22 So the idea and the -- the ground on which the art
23 was distinguished was to say this patent is about service
24 class rules, and those service class rules are
25 automatically assigned in this context. This isn't a

1 manual process. You don't have somebody punching in keys
2 at a system administration console or something. This is
3 an automated process, and that's what the patent applicants
4 told the examiner.

5 And following this, of course, the -- the claims
6 did, in fact, issue.

7 So the -- currently, the Court's preliminary
8 construction tracks very closely to the second highlighted
9 phrase here, the one that says the policies include rules
10 which use file attributes to determine a service class for
11 the file. That's almost exactly the same words that are
12 currently in the Court's preliminary construction.

13 We're simply asking that the Court's construction
14 also account for the language in the preceding paragraph on
15 Page -- on Page 4 of the file history that says that this
16 is an automatic process, and all of this is done
17 automatically.

18 Just to -- to finish it out, Your Honor, I'd
19 note --

20 If we can turn to Slide 10, please, Mr. Daybell.
21 -- that the idea that this is all done
22 automatically is fully consistent with the patent
23 specification.

24 In the -- in the summary of the invention, the
25 patent says multiple times that this is an automatic

1 process, that these service class rules, you apply them,
2 and the service classes are automatically selected. This
3 is all done by -- you know, by the system essentially
4 looking at the file attributes and making a determination.

5 So what was said in the file history to
6 distinguish the prior art and get the patents allowed is
7 fully consistent with the specification.

8 Thank you, Your Honor.

9 THE COURT: And thank you.

10 A response?

11 MR. FLYNN-O'BRIEN: Yes, Your Honor. This is
12 Michael Flynn-O'Brien for the Plaintiff, Daedalus Blue.

13 Mr. Bobrow, if you could turn off screen sharing
14 so I could -- thank you very much.

15 MR. BOBROW: I was just trying to find the button.

16 MR. FLYNN-O'BRIEN: Your Honor, thank you.

17 As a preliminary matter, Daedalus stands on its
18 papers with respect to its proposed construction of service
19 class rule.

20 As set forth therein, you know, we contend that
21 Microsoft has not justified departing from the plain
22 meaning of service class rule and hasn't identified any
23 ambiguity in the term, and there's no dispute as to what a
24 service class is or what a rule is.

25 Indeed, both Microsoft's construction and the

1 Court's construction use the term "service class" and
2 "rule" without any further clarification being required.

3 Nor, contrary to Mr. Bobrow's presentation a few
4 minutes ago, has Microsoft identified an express definition
5 in the specification for service class rule that includes,
6 for example, "automatically," or a clear unambiguous
7 disavowal of claim scope during prosecution. And I'll
8 return to that in a second.

9 I mean, to be frank, we don't quite understand
10 where the dispute lies on this term. As shown in the
11 parties' respective papers, both parties seem to agree that
12 the plain and ordinary meaning of service class rule was a
13 rule applied or used to assign a service class to a file,
14 full stop. So there doesn't seem to be a basis to rewrite
15 the claim, certainly not as extensively as -- as Microsoft
16 has originally proposed or as it proposed going further
17 today.

18 You know, we recognize that the Court in its
19 preliminary constructions has construed the term "service
20 class" to include a limitation from dependent claims.
21 While we disagree, there was or is --

22 THE COURT: Counsel, I'm -- counsel, I'm having a
23 little bit of a hard time hearing you. I'm not sure how to
24 fix that for you, but if you could either talk louder or
25 get closer or something. I'm -- I can -- I can hear you

1 but not well, and when we're talking about stuff that's
2 semi-technical or complicated, it's better if I can -- if I
3 can hear you, so...

4 MR. FLYNN-O'BRIEN: Sure. Your Honor, is this
5 better?

6 THE COURT: Sorry, not a lot.

7 MR. FLYNN-O'BRIEN: Well, I'm going to move the
8 microphone to right -- right below my chin. See if
9 that's --

10 THE COURT: That -- that's better for me. Thank
11 you.

12 MR. FLYNN-O'BRIEN: Okay. Thank you, Your Honor.
13 And I apologize for that.

14 THE COURT: No, no, or -- or can you push it back,
15 and I just won't be able to hear you.

16 MR. FLYNN-O'BRIEN: I prefer that -- to sit with
17 the microphone right underneath.

18 THE COURT: Okay.

19 MR. FLYNN-O'BRIEN: All right. We recognize that
20 the Court has in its preliminary constructions construed
21 the term "service class rule" to include a limitation for
22 the dependent claims.

23 While we disagree there was or is a need to do so,
24 we will not advance that argument any further here, except
25 to point out that the claims already describe and explain

1 how the service class rule is applied, what applies it.

2 For example, here we have Claim 1, which recites a
3 file evaluation module configured to apply the service
4 class rule to assign a service class to a file.

5 In this case, what we have -- service class rule
6 is clearly a structural limitation, right? You have one
7 structure of the file evaluation module configured to apply
8 another structure, the service class rule, to end up with a
9 result, another structure, a service class being assigned
10 to a file.

11 What both the Court's preliminary construction and
12 Microsoft seeks to extend here is effectively to convert
13 this pure structural limitation into a functional one,
14 which is a little ironic, given Microsoft's -- its
15 inclination to like any functional claiming whatsoever in
16 the rest of the claims of the patents at issue here.

17 We -- with respect to automatically, it's our
18 position that there is no need to kind of take this any
19 further than the Court has already done. There is no need
20 to take this structural claim limitation and further extend
21 it into a purely functional limitation.

22 With respect to the prosecution history, its claim
23 or argument that Microsoft proposes, I think they're --
24 you're only being presented with part of the story. In the
25 portion of the spec, not shown here but as shown in

1 Microsoft's slides, besides Paragraph 9, the word
2 "automatically" is used with respect to policies, not the
3 service class rule.

4 The prosecution history does not say that the
5 service class rule automatically applies the attributes
6 or -- and indeed, the prosecution -- there certainly is no
7 unambiguous disclaimer in the prosecution history.

8 Here, Paragraph 10 is the portion relied upon in
9 Microsoft's briefing, which refers to, of course, the file
10 attributes the Court has added to its preliminary
11 construction. There is no, in Paragraph 10, reference to
12 automatically.

13 Similarly, in Paragraph 11, when the applicant
14 continues to summarize and distinguish the prior art, it
15 doesn't use either automatically or for that matter file
16 attributes when describing what a service class rule is.
17 This is in Paragraph 11.

18 Finally, and I would just point out that in
19 Paragraph 13, when the applicant is summarizing the various
20 manner in which it gets over the prior art, the prior art
21 at issue here was condo, it's not limited to a service
22 class rule and certainly not limited to automatically
23 applying such a service class rule, or having a service
24 class rule automatically apply to file attributes.

25 It describes a number of other reasons, different

1 reasons why condo, that prior art, failed to teach or
2 describe the claimed invention, including that there wasn't
3 a data management system described therein, and there
4 wasn't some of these other claim limitations, including a
5 file evaluation configured to apply the service class rule
6 to assign a service class to a file.

7 So in conclusion, we don't propose changing the
8 Court's construction, but we don't think it's necessary to
9 add automatically.

10 Thank you.

11 THE COURT: Very good. A response?

12 And by the way, let me just note on Slide 4, the
13 little "where's the beef" picture is -- whoever threw that
14 in, that was -- I haven't had that happen before on these
15 slides. So I thought that was kind of cute.

16 A response?

17 MR. BOBROW: Yes. Thank you, Your Honor.

18 First of all, on Slide 4, let me begin with that
19 because the suggestion seems to be made that the parties
20 have no disagreement here, and that's simply not the case,
21 as the Court can tell, not only from the arguments being
22 made, but what is on Slide 4 is a misstatement of our
23 position.

24 All we said in the brief that's being quoted here
25 is that the service class rule is used to assign a service

1 class to a file. That wasn't an attempt to define the
2 term. That's essentially saying what the service class
3 rule does, not what the service class rule is.

4 What the service class rule is we set forth in our
5 papers, and we think that with the modification that we've
6 proposed, that that is a suitable definition with the
7 modification that we proposed to the Court's construction.

8 Next, with respect to the argument being made that
9 the claims themselves say what is doing or not doing the
10 applying of the service class rules, that is the very
11 nature, Your Honor, of a disclaimer, as the Court well
12 knows.

13 There are times when a patent applicant doesn't
14 put a matter into the claims themselves but states through
15 definitional language, states through representations,
16 disclaimers, or disavowals that, indeed, the claims are to
17 be narrowed or to be construed in a particular way.

18 That's precisely what we have here. We have the
19 patent applicant saying that what their invention is, is
20 automatically applying these rules in a particular way, and
21 hence, whether it's in the claim or not, the claims need to
22 be construed in that fashion.

23 Next, with respect to the argument about
24 automatically and how the file history talks about the
25 policies being applied automatically and not the rules, as

1 noted in the file history, the file history says that --
2 and this is at Page 5 of the file history, Paragraph 10 --
3 that, quote, the policies include rules which use file
4 attributes to determine a service class for the file.

5 These rules are the service class rules recited in
6 Claim 1. That's what the patent applicant said. The point
7 being that policies are nothing more here than a collection
8 of rules. And when you automatically apply the policies,
9 you are necessarily automatically applying the rules. They
10 go hand-in-glove.

11 So the -- the idea that because it talks about the
12 automatic application of policies that somehow that doesn't
13 apply to rules is simply mistaken.

14 And, finally, Your Honor, if I heard it correctly,
15 the argument seemed to be that there were some other bases
16 for distinguishing the condo prior art reference or perhaps
17 there were -- the applicant didn't need to distinguish
18 condo on the grounds that it's automatic because there were
19 other issues going on.

20 But as Your Honor knows, that's beside the point
21 when it comes to disclaimer, because under clear Federal
22 Circuit precedent, what you look at is what the applicant
23 said, not what was needed to distinguish the art but what
24 the applicant said to distinguish the art.

25 I would cite to the Court the Technology

1 Properties Limited case, 849 F.3d 1349, which is a Federal
2 Circuit case from 2017 that -- that is precisely in support
3 of that proposition.

4 So, Your Honor, we -- we do think with this minor
5 adjustment that reflects what's in the file history, that
6 reflects what's in the specification, we think that with
7 that fine-tuning, that the Court's preliminary construction
8 stands well.

9 Thank you.

10 THE COURT: Any response from Plaintiff?

11 MR. FLYNN-O'BRIEN: Briefly, Your Honor.

12 Only to point out that as even Mr. Bobrow admits,
13 when the -- the applicant is speaking about service of
14 automatically associating in the prosecution history, it's
15 talking about policies. Those policies make up the rules
16 that is different than what Microsoft is proposing in its
17 modest modification of the construction. It's talking
18 about where the rule which uses file attributes to
19 automatically determine a service class for a file.

20 That is not in the prosecution history. So we
21 would submit that there is no clear and unambiguous
22 disclaimer that justifies Microsoft's amendment to the
23 Court's preliminary construction here.

24 Thank you.

25 THE COURT: Anything else from counsel for

1 Defendant?

2 MR. BOBROW: Nothing, Your Honor. Thank you.

3 THE COURT: Okay. I'll be back in a few seconds.

4 (Pause in proceedings.)

5 THE COURT: If we could go back on the record.

6 The Court finds that there's not a sufficient
7 disclaimer to merit adding the word "automatically." The
8 Court is going to maintain its preliminary construction,
9 and make it its final construction.

10 We are on next to the claim term that begins with
11 "resource management logic."

12 Mr. Bobrow, are you -- is this you, as well?

13 MR. BOBROW: No, my -- my colleague, Mr. Daybell,
14 will be handling the -- the balance of the -- the terms,
15 which are all "means-plus-function."

16 THE COURT: Well, I'm disappointed I won't have --
17 get to hear from you anymore, but I look forward to this,
18 as well. So --

19 MR. BOBROW: Thank you so much, Your Honor.

20 MR. DAYBELL: Thank you, Your Honor. Don Daybell
21 for Defendant.

22 So the first term is "resource management logic."

23 THE COURT: Mr. Daybell, have -- I don't think you
24 appeared before in front of me, have you, to argue?

25 MR. DAYBELL: I have not, Your Honor. This is the

1 first time.

2 THE COURT: Well, I wanted to welcome you to my
3 court. It's a pleasure to have you.

4 MR. DAYBELL: Thank you. I'm pleased to be here.

5 So resource management logic -- and I'll -- I'll
6 spare you the lengthy recitation of the function. I'd like
7 to cut straight to the chase on this one, and that is, it
8 is our view that this term is a means-plus-function term,
9 as Your Honor has preliminarily found, but that the
10 specification fails to disclose the complete structure
11 to -- that corresponds to the functions recited in the
12 claim.

13 In particular, as you can see on the slide I have
14 in front of you, the claim recites: Resource management
15 logic to distribute server resources according to predicted
16 resource needs.

17 And when we look at the specification for any
18 teachings about how these resource needs are predicted such
19 that the server resources could be distributed, we find a
20 single sentence that is on the screen which says: In the
21 exemplary embodiment, the resource requirement predictions
22 can be utilizing one of many algorithms. And that's all
23 they say about how to predict the resources that you need
24 in order to -- the resource needs in order to distribute
25 the server resources.

1 Clear Federal Circuit precedent holds that simply
2 disclosing an algorithm or in this case one of many
3 algorithms is insufficient to identify structure, and that
4 renders the claim indefinite, and that's the Federal
5 Circuit's seminal case in Aristocrat Technologies and the
6 Triton Tech case from 2014.

7 So it is our position that the resource management
8 logic term is indefinite because it fail -- the
9 specification fails to provide any algorithm for a function
10 that is required of the resource management logic, and that
11 function being to distribute server resources according to
12 predicted resource needs.

13 Now, the Court identifies Figure 3 as the
14 algorithm for the resource management logic, however, as I
15 just indicated, that algorithm fail -- and the supporting
16 text in the figure fails to disclose how resource
17 requirements are predicted.

18 In fact, it -- it essentially throws up its hands
19 and says, there's a lot of different ways you could do it
20 to a POSITA. We're not telling you which one we've
21 invented. We're not telling you which one to use. We're
22 leaving that as an exercise to a POSITA to try and figure
23 out what the scope of this claim means. And that's just
24 not proper under the -- the Federal Circuit's precedent on
25 indefiniteness.

1 The Federal Circuit's precedent on indefiniteness,
2 as applied to means-plus-function terms, says that you, the
3 patent owner, as a -- as the sort of quid pro quo for being
4 allowed to use functional claiming, have to provide the
5 algorithm, the structure, for the recited function. And
6 they simply don't do that.

7 And that's really it with this one, Your Honor.
8 So with that, I will -- I will rest and wait to hear from
9 my esteemed colleague on the other side.

10 THE COURT: Well, if every lawyer that appears in
11 front of me handles their claim term this quickly, then as
12 of right now, you're my favorite lawyer ever. So --
13 especially for a means-plus-function claim.

14 So -- but you were -- I think you hit exactly the
15 most important issue, and I look forward to hearing from --
16 for a response from Plaintiff.

17 MR. DAYBELL: Give me a moment to stop sharing my
18 screen so that -- there we go.

19 MR. FLYNN-O'BRIEN: Thank you, Your Honor. Can
20 you hear me okay? This is Michael Flynn-O'Brien for the
21 Plaintiff again.

22 THE COURT: I can, yes, sir. Thank you,
23 Mr. Flynn.

24 MR. FLYNN-O'BRIEN: All right. Given the Court's
25 preliminary determination that 112(f) applies to this claim

1 limitation, we -- we agree that it's not indefinite and
2 dispute Microsoft's arguments to the -- to the contrary.

3 First, with respect to the claimed function, there
4 isn't a dispute. The parties and the Court agree that that
5 function is to distribute server resources to each of the
6 plurality of virtual machines, according to current and
7 predicted resource needs of each of the multiple workloads
8 utilizing the server resources. It's here reflected on the
9 slide in Claim 1.

10 Microsoft, however, in its briefs and in argument
11 today has chopped up and twisted this claim language in an
12 attempt to redefine the function so that it can find
13 indefiniteness where there is none.

14 In particular, and most egregiously, it drops the
15 portion to each of the plurality of virtual machines to
16 effectively rewrite this claim limitation so that the
17 function is a two-parter to distribute server resources
18 according -- according to current resource needs and
19 distribute resource -- server resources according to
20 predicted resource needs.

21 But that's not accurate. The primary function
22 here and the one to which the claimed invention is directed
23 is this first part, to distribute server resources to each
24 of the plurality of virtual machines.

25 Yes, it recites according to current predicted

1 resource needs, but that as described in the background of
2 the invention are things known to some degree in the prior
3 art, specifically the background of the invention refers to
4 load balancers being known, and the ability to use load
5 balancers to measure current load being known, but it was
6 historically done on a per-server basis.

7 In addition, you know, there -- it discusses how
8 you -- you can use load balancers or other mechanisms to
9 predict resource needs, for example, the time of day, the
10 geography in which your customers are trying to access the
11 applications at issue.

12 What's unique and particular -- inventive about
13 this invention is how does it measure those current
14 predicted resource needs? What does it use to measure
15 those? Here, in the invention, the load balancers are
16 specific to customer applications or customers, and those
17 customer applications' workloads are distributed across
18 multiple machines.

19 What's further important is what the claimed
20 invention does with that information, and it distributes
21 those server resources to each of a plurality of virtual
22 machines in order to handle that distributed workload.

23 And that, we submit, is precisely the algorithm
24 that the Court has identified on Figure 3.

25 So here, we have Figure 3a, and we've highlighted

1 different stages of the algorithm. First, on the left, you
2 have the measuring of the load. Second, on the right, you
3 have a prediction being made. It makes a prediction as to
4 the resource requirements of the customers.

5 Continuing on --

6 MS. GILBERT: Excuse me, Mr. Flynn-O'Brien. I
7 don't think we're seeing what you're seeing on -- you're
8 sharing on your screen.

9 MR. FLYNN-O'BRIEN: Thank you, Counsel. Could
10 you -- what exactly are you seeing?

11 MS. GILBERT: I am seeing a PowerPoint
12 application, and it has -- we are on Slide 10 in the middle
13 with slides on the side. Oh, and this is now showing us
14 the next slide.

15 MR. FLYNN-O'BRIEN: Your Honor, I apologize for
16 this technical mishap.

17 MS. GILBERT: Yes, I think we are now seeing Slide
18 14.

19 MR. FLYNN-O'BRIEN: Okay.

20 MS. GILBERT: Thank you.

21 MR. FLYNN-O'BRIEN: Just restate.

22 The algorithm that the Court has identified in
23 Figure 3, along with the corresponding description, matches
24 the claim language. That algorithm is in Step 1 to measure
25 the load of the customer -- system customers; to 2, make

1 predictions as to the resource requirement was those system
2 customers; 3, to determine appropriate assignment resource
3 allocations for the VMs to accommodate the customer
4 application workloads; and, 4, as shown here on the right,
5 in Figure 3, to allocate and assign server resources and
6 workloads to VMs.

7 Microsoft's primary argument here is to -- is that
8 the algorithm needs to go further to require -- to actually
9 disclose kind of a subsidiary algorithm as to how that
10 allocation is -- how the measurement is done and how the
11 predictions are made. But that is not necessary to the
12 claim limitation, nor is it the focus of the claim
13 limitation. We submit that additional disclosure is not
14 required.

15 And with that, I'll -- I'll turn it over.

16 THE COURT: If you-all would give me one second.
17 I'm going to give counsel for Microsoft an opportunity to
18 respond, but just give me one second.

19 (Pause in proceedings.)

20 THE COURT: Okay. A response?

21 MR. DAYBELL: Yes, very briefly, Your Honor.

22 Counsel for Daedalus suggested that the
23 predictions and resource requirements are not required by
24 this claim, if I heard him correctly, and that's just not
25 true.

1 The claim clearly recites: Distributing server
2 resources according to predicted resource needs. That's
3 what we're focusing on. It's true, it talks about where
4 it -- where the resources are or what -- what workloads are
5 required and things like that, but we're focusing on
6 distributing server resources according to predicted
7 resource needs.

8 And there simply is no algorithm for that
9 disclosed in the specification for predicting resource
10 needs. And if I have no -- no way of predicting -- no way
11 of knowing how the resource needs are predicted, you can't
12 distribute the server resources according to those needs.
13 You have to be able to predict the resources in order to
14 distribute the server resources.

15 And I take it from Plaintiff counsel's silence
16 that they agree that there is no algorithm in the
17 specification for how to predict resource needs. In fact,
18 the specification clearly says you could use one of many
19 algorithms. You can pick an algorithm.

20 My final point, I guess, is the fact that a person
21 of ordinary skill in the art might be able to figure out
22 how to do it is not the test here. The test is does the
23 specification disclose an algorithm to one of ordinary
24 skill in the art?

25 This specification, clearly -- in fact, I would

1 submit expressly says, no, I'm not telling you which
2 algorithm we're using. I'm telling you there's a whole
3 bunch of them. You go figure it out. And with that, I'll
4 rest.

5 THE COURT: I'll be back in just a few seconds.

6 (Pause in proceedings.)

7 THE COURT: If we can go back on the record.

8 Again, the Court is going to maintain its
9 preliminary construction.

10 We'll turn to the next claim term, which I
11 understand begins with "global resource allocator."

12 Mr. Daybell, is this you, as well?

13 MR. DAYBELL: It is me, as well, Your Honor.

14 THE COURT: Did I get close to pronouncing your
15 name right? Is it Daybell or Daybell?

16 MR. DAYBELL: It's Daybell, just like the word
17 "day" followed by the word "bell." Daybell.

18 THE COURT: Got it. Thank you, sir.

19 MR. DAYBELL: Uh-huh.

20 Counsel, if you could stop sharing your screen,
21 please. Thank you.

22 So "global resource allocator."

23 And, Your Honor, I'll try to be as brief as I was
24 on the last time -- apologies, let me just make sure I'm
25 not on mute. I'm not. Okay.

1 So the focus of the term here is the first three
2 words, "global resource allocator."

3 What we have here is a functional word, an
4 allocator, that allocates global resources. And that's all
5 that the claim talks about that could be considered
6 structural.

7 So there is no structure to the term "allocator."
8 As this Court has -- has -- or as the Federal Circuit has
9 found, terms such as allocator there are simply functional
10 are means-plus-function terms because they don't teach any
11 particular structure. For example, the Federal Circuit has
12 found that a symbol generator was simply describing the
13 function as generation of symbols.

14 Here, a global resource allocator is the same
15 thing. It's simply something that allocates global
16 resources, and there's nothing else in the language of the
17 claim that suggests any structure.

18 Even if we were to assume that the allocator were
19 software, that is not sufficient structure, as this Court
20 has held in the context of the term "communication module,"
21 which we'll actually talk about a little bit later.

22 Here, this Court held that even though module
23 relates to software and communication module certainly
24 refers to software related to communication, that is
25 nowhere near the sufficiently definite structure required

1 by Federal Circuit precedent.

2 And the same thing applies here. Even though an
3 allocator might be software and it allocates global
4 resources, that refers to maybe software that allocates
5 global resources, that's not definite structure. It wasn't
6 in the Digital Retail case, and it's not here.

7 So because of that, we have to look to the
8 specification to see what algorithm is disclosed. And we
9 submit it's the algorithm that we set forth in our papers,
10 which is similar to the one disclosed in Figure 3 of the
11 patent, although there is -- there is a difference because
12 this claim term does not specifically require predicted
13 resource needs; and, therefore, the more general algorithm
14 of Figure 3 is essentially the algorithm that -- that we
15 propose. We had a few modifications to it.

16 But the key here is global resource allocator
17 simply is not -- there is -- simply is no structure in the
18 claim for what a global resource allocator is, which means
19 we have to go to the specification. And once we do that,
20 it's a means-plus-function term.

21 I guess I would conclude with -- with noting that
22 if we were allowed to look at the specification for a claim
23 term under Williamson to decide whether it is
24 means-plus-function or not, then the only claim terms under
25 Williamson that would be means-plus-function would be those

1 that were indefinite because the specification had no
2 structure.

3 So we know that can't be the test. The test here
4 has to be to look at the language of the claim and decide
5 if it discloses structure.

6 And this claim term simply does not. It has a
7 global resource allocator for -- and that tells you where
8 it is, it's included in the workload servers, and for --
9 and then performing the function, receiving messages and
10 assigning a combination of -- there's simply nothing
11 structural in this claim.

12 And with that, I will rest.

13 THE COURT: Response?

14 MR. FLYNN-O'BRIEN: Thank you, Your Honor.

15 Your Honor, a couple preliminary points, and I'll
16 address Mr. Daybell's last point first, that the test in
17 Microsoft's view is that you must first -- in order to
18 determine whether 112(f) applies to a particular claim
19 limitation look at the claims in isolation of the spec.
20 That is not true.

21 In *Egenera*, a case repeatedly cited by Microsoft
22 in its briefs, the Court said to determine whether a claim
23 limitation at issue con -- connotes sufficiently definite
24 structure to a person of ordinary skill in the art, we look
25 first to the intrinsic evidence. That is not limited to

1 the claims. It includes the specification and the file
2 history.

3 This Court has held in accord in Ancora Techs
4 earlier last year where it said -- it said: The
5 presumption stands or falls according to whether one of
6 ordinary skill in the art would understand the claim with
7 the functional language in the context of the entire
8 specification to denote sufficiently definite structure or
9 acts for performing the function.

10 So the Court can and should look to the entire
11 intrinsic record consistent with Phillips in order to
12 determine whether in the first instance 112(f) applies.

13 With respect to the claim limitation at issue
14 here, global resource allocator, first of all, I'd address
15 the notion that there is no structure in the claim. That
16 is also false. What's missing from the recitation of the
17 limitation at issue in -- at the top in the joint claim
18 construction brief is this notion for inclusion of said
19 provider of workload servers.

20 It recites a global resource allocator, GRA, for
21 inclusion of said provider workload servers. In addition
22 to that structure -- so that's saying -- we're talking
23 about a piece of software and a particular piece of
24 hardware.

25 In addition, the claim language itself talks about

1 the inputs and outputs to that structure, and that the
2 relationship between that structure, the global resource
3 allocator, and other structures in the claims, including
4 the virtual workload servers, the customer workloads, the
5 load balancer, and all of that is within -- encompassed
6 within a server optimization device having a processor.

7 So it is not true that there is no structure in
8 the claim with respect to global resource allocator.

9 Second of all, the specification is very clear.
10 In Figures 1, for example, shown here on the screen, the
11 specification discloses and describes the global resource
12 allocator. That is in the box on the top left of this
13 figure labeled GRA. The specification describes how the
14 GRA -- what it is and how it operates and how it interacts
15 with other structures in the claim system.

16 Furthermore, the specification goes into great
17 detail in Figures 2 and 3, in combination with Figure 1 and
18 the corresponding text as to how the GRA interacts with
19 other structural elements in the claimed invention. That
20 interrelationship itself also provides definite -- definite
21 structure, as our expert, Dr. Madisetti, described a person
22 of ordinary skill in the art viewing the claims in light of
23 the specification would understand the GRA to be
24 structured.

25 Thank you.

1 THE COURT: Any rebuttal?

2 MR. DAYBELL: Yes, Your Honor.

3 If I could have the presentation back.

4 So the Federal Circuit has clearly set forth what
5 the test is for determining whether means-plus-function
6 claiming applies.

7 This is from the Advanced Ground Information
8 Systems case. And the Federal Circuit held: First, we
9 addressed whether the term in the asserted claim is
10 means-plus-function. And they say that the -- in that case
11 that the standard is whether the words of the claim are
12 understood by persons of ordinary skill in the art to have
13 sufficiently definite meaning as the name for structure.

14 A global resource allocator fails this test.

15 There is no evidence in the record that a person of
16 ordinary skill in the art would have understood an
17 allocator as the name for structure.

18 Their expert does not identify any treatises or
19 textbooks or other -- other sources of information that a
20 POSITA would have looked at that would have said this is
21 what a global resource allocator is. It's a known term in
22 the art. It does these various functions.

23 Instead, counsel points to structure for other
24 components of the claim. Counsel points to the fact that
25 the claim recites a load balancer, for example. Well, a

1 load balancer is a -- a component that does have a fairly
2 well-understood structure, which is why we didn't propose
3 it as a means-plus-function term. But it is not a global
4 resource allocator. It is a load balancer.

5 Counsel points to other components that the load
6 balancer is connected to, but that doesn't tell you what
7 the load balancer -- sorry, what the global resource
8 allocator is connected to. That doesn't tell you what the
9 global resource allocator is, what its structure is.

10 To get that, you have to look at the algorithms
11 set forth in the specification. But once you go there, you
12 are past the -- the first part of the test as to whether
13 this is a means-plus-function term, and you are into the
14 second part of the test, which is having decided that the
15 global resource allocator is means-plus-function, you look
16 to figure out what the corresponding structure in the
17 specification is.

18 And we would submit that that structure is the
19 algorithm that we have set forth and that the term should
20 be construed as means-plus-function. In order to give any
21 meaning to the Williamson case -- line of cases, which say
22 that you can have means-plus-function terms that don't use
23 the word "means."

24 In fact, this Court's pronouncement in the case I
25 spoke about earlier about communications module is on point

1 there, as well.

2 In that one, the Court found that the
3 communications module was a means-plus-function term and
4 then looked to the specification to find the algorithm for
5 it.

6 Thank you.

7 THE COURT: Anything else from Plaintiff?

8 MR. FLYNN-O'BRIEN: Briefly, Your Honor.

9 First, with respect to Advanced Ground Information
10 System, which Microsoft is relying upon here, the two-step
11 inquiry described in that case is the overall 112(f)
12 inquiry, right?

13 Step 1, determine whether 112(f) applies. To do
14 that, you look at the entire specific -- the entire
15 intrinsic record. Step 2, then -- if it does apply, then
16 you define the scope of the term with reference to the
17 specification.

18 I submit that Microsoft's misreading that case.

19 Regardless, that from 2016 is, of course,
20 superseded by Egenera, which otherwise Microsoft relies
21 upon, which refers to in that first step, where you're
22 determining whether 112(6) applies, you look at the entire
23 intrinsic record.

24 Microsoft also points out -- or purports to claim
25 that Daedalus has not identified any evidence of a person

1 of ordinary skill in the art would understand the GRA in
2 the claims to refer to structure, and that is incorrect.
3 Of course, Dr. Madisetti, in his declaration, this is
4 Docket 29-1, Paragraphs 49 through 52, establishes that a
5 person of ordinary skill in the art, in viewing the term --
6 limitation in question, would understand the GRA to refer
7 to a structure.

8 With that, I will rest.

9 THE COURT: Anything else from Plaintiff?

10 MR. DAYBELL: Briefly. Very briefly, Your Honor.
11 Simply to observe that --

12 THE COURT: On the record, I screwed up. Anything
13 else from Microsoft? I apologize.

14 MR. DAYBELL: Very briefly. Very briefly, Your
15 Honor. Simply to observe that Dr. Madisetti didn't
16 identify any support for his opinion that the global
17 resource allocator would be structural in the terms of
18 treatises or textbooks or examples of other persons of
19 skill in the art using that term in any sort of technical
20 sense.

21 That's it.

22 THE COURT: Anything else for Plaintiff?

23 MR. FLYNN-O'BRIEN: No, Your Honor. Thank you
24 very much.

25 THE COURT: I'll be back in a few seconds.

1 | (Pause in proceedings.)

THE COURT: If we can go back on the record.

3 The Court is going to maintain its preliminary
4 construction.

5 And we'll turn to the final claim term that I'm
6 aware of, which is "communication module." And, again, we
7 will -- I'll start with -- with the Defendant, Mr. Daybell.

8 MR. DAYBELL: Thank you, Your Honor.

9 Let me get my screen share going.

10 So the term "communication module," this is from
11 the '132 patent. And the -- the Court has -- we've already
12 talked about the case. The Court has already held that a
13 communication module in another case is means-plus-function
14 because modules are not words that do not impart structure.

15 In this particular patent, it is abundantly clear
16 that a module can be practically anything. The patent
17 specification, at Column 4, recites that the functional
18 units described in the specification has been labeled as
19 modules, in order to more particularly emphasize their
20 implementation independent.

21 So we have a patent that expressly tells a POSITA
22 these modules are functional, and they can be implemented
23 any way you want. They're implementation independent.
24 Then it gives some examples about hardware, circuits,
25 programmable hardware, or software.

1 So this is a module -- this is a term that can be
2 anything. And as we know, a communication module, as the
3 Court has previously held, simply refers to a module used
4 in communication. That's not sufficiently definite
5 structure as required by Federal Circuit precedent.
6 Therefore, this communication module term should be
7 construed to be means-plus-function.

8 Once we get there, the remainder of the term, if
9 we were to look at the rest of the claim language, as we
10 are supposed to do under the Advanced Ground Systems case,
11 simply says that the module is operable to perform certain
12 functions and is configured to perform certain functions.

13 Here, again, the Federal Circuit has spoken and
14 has clarified that operable when executed refers to a
15 desired function or outcome, without providing any
16 limitations or detail -- any limiting detail.

17 And the Southern District of New York has agreed
18 and says that monitoring device invokes MPF claiming
19 because it simply recites function -- or recites a device
20 operable to perform functions. So "operable to" does not
21 convey any structure to an otherwise functional term.

22 And similarly, "configured to" does not either.
23 The Federal Circuit, again, has spoken. Using -- replacing
24 the word "for" with the word "configured to" is purely
25 functional claim language identifying what the user

1 identification module in that case was configured to do,
2 and that provides no structure.

3 And similarly, reciting what the mechanical
4 control assembly in the MTD Products case was configured to
5 do is, again, functional, it's not structural. So there is
6 no structure recited in this -- in this claim limitation,
7 which means that we need to look to the specification to
8 find the algorithm, as this Court well knows.

9 However, there is no algorithm set forth for the
10 communication's function in -- in this patent. The patent,
11 a couple of places, recites that the client communicates
12 with the server, but it doesn't say anything about how. It
13 doesn't provide a series of steps about what the client
14 needs to do in order to communicate with the server. It
15 simply says the client can communicate.

16 In a few places, it talks about other functions,
17 like translating, that happen either before or after a
18 communication, but it doesn't talk about the communication
19 function itself.

20 And, in fact, Plaintiff was unable to identify any
21 algorithm in the specification for the communication
22 function either. It simply asserts that a number of
23 hardware elements are involved, a processor, a network, a
24 network interface, and that there was an algorithm
25 disclosed somewhere within four figures of the patent, the

1 text that corresponds to it, and the laundry list of
2 citations that spans across a number of columns of the
3 specification.

4 That's not an algorithm. That's -- that's an
5 attempt to find whatever they could and throw it at the --
6 at the wall and hope something sticks.

7 To the extent that Daedalus contends that a
8 processor provides a structure, we know from WMS Gaming
9 that a processor can't provide structure for a
10 computer-implemented claim. It needs to be a processor
11 configured with a particular algorithm.

12 And to the extent that Daedalus contends that
13 networks are structure, this is also incorrect. The
14 networks, according to the specification, provides
15 connections between the various components, so the clients
16 are connected physically with -- with the network, and the
17 servers are connected physically with the network. But
18 that doesn't say anything about how the data is transmitted
19 back and forth across these connections. So that's a
20 different function.

21 And the network interface that Daedalus points to
22 simply isn't part of the communication module. If we look
23 at Claim 9, it recites the communication module. And then
24 there's a dependent claim, Claim 11, which says that Claim
25 9 further comprising a network interface. So the network

1 interface is an additional component separate from the
2 communication module, so it can't provide the structure for
3 the communication module itself.

4 And with that, I will rest my point, unless the
5 Court has any questions.

6 THE COURT: A response?

7 MR. FLYNN-O'BRIEN: Yes, Your Honor.

8 Let me get our slides up.

9 MR. DAYBELL: Yeah, let me get out of the way.
10 There.

11 MR. FLYNN-O'BRIEN: First of all, there is no such
12 thing as a per se nonce word. Daedalus's briefs are
13 replete with cases, from this Court and others, declining
14 to apply 112(f) to terms containing the words "logic" or
15 "module" and the like.

16 The fact that a claim term or claim limitation --
17 extensive claim limitation, as in this case, uses the word
18 "module" or does not itself render it subject to 112(f),
19 what matters, of course, is whether a person of ordinary
20 skill in the art, in view of the claim language and the
21 specification, understands the claim limitation as issued
22 to refer to structure.

23 And here, it clearly does.

24 Now, Microsoft wants to discount the presence of
25 modifiers, such as communication, on communication module.

1 But -- but that is -- is distinction with a difference.

2 On the one hand, you have cases like Egenera and
3 Digital Retail on which Microsoft relies where it recites a
4 module or logic with no modifiers.

5 And on the other hand, you have cases like those
6 cited in Plaintiff Daedalus's briefs, Mynette, CDN,
7 Intellectual Ventures, where the word "module" was preceded
8 by modifiers that in view of a person of ordinary skill in
9 the art gave the term sufficient structure, and that's
10 certainly the case here.

11 Courts have, both before and after Williamson,
12 declined to apply 112(f) to communication module.

13 On this slide, we're citing to Intellectual
14 Ventures II v. FedEx, from the Eastern District of Texas
15 2017. And we have below that Blast Motion v. Zepp from the
16 Southern District of California, also in 2017.

17 In both cases, the Courts were looking at
18 "communication module" and declining to apply 112(f), just
19 as this Court has done in its preliminary constructions.

20 In the Intellectual Ventures case, the Court
21 determined no construction was necessary, much like this
22 Court has done.

23 And in Blast Motion, of course, the Court
24 construed the term to mean hardware and/or software capable
25 of transmitting data between devices.

1 In neither cases was the term, of course, held to
2 be indefinite. The distinction, of course, what matters is
3 the claim language. And, here, the claim language clearly
4 denotes structure to a person of ordinary skill in the art.

5 You have a data management system comprised of
6 various structures. A policy set, a file evaluation
7 module, a file usage module. I point out that Microsoft
8 does not contend that either of these other module terms
9 are subject to 112. And a communication module.

10 And what's particularly important here is to note,
11 this claim limitation specifically recites where that
12 communication module is and what it does. It is between
13 the file evaluation module and a plurality of remote
14 clients.

15 And I will direct you, of course, to Claim 9,
16 which Microsoft focused on in its presentation, shown here
17 in the center of this slide.

18 Here, in Claim 9, it goes further. It refers to a
19 communication module that is within a metadata server, that
20 metadata server comprising a processor and a memory.
21 Within that memory, computer code. And within that
22 computer code, a communication module. Thus, we have
23 specific and sufficient structure, a software structure on
24 a particular piece of hardware designed to perform a
25 particular function, as described. That is sufficient

1 structure to avoid the advent of 112(f).

2 And it may be worthwhile, with respect to -- so
3 the claim refers to structure. There is no need to further
4 look for an alleged algorithm.

5 Microsoft focuses -- even if you were to look for
6 an algorithm or something of that sort, Microsoft focuses
7 on the lack of -- or what it purports to think of as a lack
8 of disclosure of a particular protocol that the
9 communication module uses.

10 But as shown in our -- in the declaration of Vijay
11 Madisetti, in the context of this invention and this claim,
12 a person of ordinary skill in the art is going to
13 understand that there is a class of communication protocols
14 that make sense.

15 Here, we have a data management system distributed
16 with clients, as shown in this figure in multi-colors in
17 the top left, of heterogeneous operating systems,
18 communicating via a LAN, that's the line on the left
19 labeled 112, to metadata servers in purple below.

20 A person of ordinary skill in the art is going to
21 understand the communication protocols likely used by those
22 devices are going to be something like TC/IP (sic), which
23 Microsoft itself relies upon in this case.

24 Furthermore, you have the -- these workstations or
25 servers, these clients and metadata servers connected to

1 storage ports via a SAN. A person of ordinary skill in the
2 art is going to understand certain class of communication
3 protocols is going to be used by that structure, SAN,
4 including fiber channel, InfiniBand, and the like. So
5 there is no real lack of disclosure, even if one was
6 required, which none is.

7 Finally, I just point out that Microsoft kind of
8 gives the back of the hand to this notion of how the
9 communication module -- what the specification describes
10 the communication module is doing in order to facilitate
11 communications between the file evaluation module and the
12 plurality of remote clients using different operating
13 systems as claimed.

14 The specification explains that that communication
15 module will in -- there's a problem caused by these clients
16 of -- with different operating systems, namely that their
17 file attributes of those files cannot be easily compared.
18 The specification explains the communication module
19 sometimes includes the translation module.

20 So in cases where the file attributes are sent in
21 the universal format, it accepts them as is and sends them
22 on the file evaluation module. But in other cases where
23 it's in a platform-specific format, the communication
24 module then has a translation -- performs translation to
25 translate those platform-specific attributes into a

1 universal format for use with the rest of the system.

2 All of which to say that communication module, as
3 claimed, is structure, and there is no reason to apply
4 112(f) to this term.

5 Thank you.

6 THE COURT: A response?

7 MR. DAYBELL: Yes, Your Honor.

8 So, first, I guess I'll take one of the last
9 points Mr. Flynn-O'Brien made. He contended that the
10 specification discloses that a communication module can
11 include a translation module. That -- that's simply
12 incorrect.

13 The specification says nothing about what the
14 communication module does. It doesn't even use the words
15 "communication module" outside the claims. So it's simply
16 incorrect that this communications module allegedly
17 includes a translation module.

18 Secondly, Mr. Flynn-O'Brien suggested that there
19 are certain functions that, as he put it, facilitate
20 communications. Well, facilitating communications is not
21 communicating. That may be a step that happens before or
22 after a communication, but it is not a communication.

23 And, third, I still haven't heard of any algorithm
24 that is disclosed in the specification, nor have I heard
25 Mr. Flynn-O'Brien identify any such algorithm. He threw

1 out a few buzz words about TCP/IP and fiber channel and
2 what a person of skill in the art might understand, but
3 none of that is set forth in the specification.

4 And as our expert, Dr. Zadok, has explained, at
5 Paragraph 67 to 70, the problem -- of his declaration --
6 the problem of solving multi-client, multi-server
7 communications, as claimed in this claim, is a complex
8 problem. It's not simple. It's not straightforward.
9 There are many different ways to do it.

10 And it was incumbent upon the patent owner to
11 identify the particular algorithm that they intended to be
12 used for this communications module in order to benefit
13 from the functional claiming that they resorted to, and
14 they simply did not.

15 Now, if we turn to the -- their -- their argument
16 about other structure recited in the language of these
17 claims, that's -- with all due respect, that is not
18 anything having to do with the communications module. The
19 processor is simply a processor.

20 As we all know, processors by themselves do not
21 provide structure for software and things. The module is,
22 as Claim 9 recites, a piece of code, and, therefore, you
23 have to provide an algorithm for that code. Simply saying
24 that it's software is insufficient.

25 If Mr. Flynn-O'Brien would give me the screen

1 back.

2 The case cite from this very Court could not be
3 more on point. The term "communication module" simply
4 refers to a module that is used in communication -- it's
5 what this Court held in a previous case in Digital Retail
6 Apps.

7 So, first, I would note that contrary to
8 Mr. Flynn-O'Brien's statement, this Court was addressing
9 exactly the term at issue here, a communication module. It
10 was not addressing a module in a vacuum.

11 And this Court held that even though that
12 pertained to software, that module did, and even pertained
13 to software referring to -- relating to communication,
14 there still was nowhere near sufficiently definite
15 structure required by Federal Circuit precedent.

16 And exactly the same thing applies in this case.
17 The claim does not recite any structure. It simply recites
18 the communication module that is operable and configured to
19 perform various functions. It does not -- the claim does
20 not say that the communication module is located between a
21 file evaluation module and the client. It says that it is
22 operable to communicate between the two. It says nothing
23 about where this module is located with respect to these
24 two other -- other components.

25 There -- there simply is no -- to paraphrase the

1 client's previous one about "Where's is the beef," there is
2 no "there" there. There is no algorithm there. And for
3 that reason, we submit that this claim is indefinite.

4 THE COURT: Any response?

5 MR. FLYNN-O'BRIEN: Yes, sir, briefly.

6 Mr. Daybell, would you mind giving back control?

7 MR. DAYBELL: There we go.

8 MR. FLYNN-O'BRIEN: There is no algorithm
9 necessary here because the term "communication module,"
10 particularly the entire limitation at issue, connotes --
11 denotes sufficient definite structure for a person of
12 ordinary skill in the art.

13 In that regard, I would direct the Court to
14 Dr. Madisetti's declaration, which is Docket No. 29-1,
15 starting at Paragraph 71 and continuing through 78.

16 Digital Retail, on which Microsoft relies is
17 distinguishable. In that case, the claim recited
18 communication module on an island. It was a limitation on
19 its own.

20 It was not as it is in this case, related to other
21 claim limitations or had additional disclosure of what that
22 communication module did, how it interacted, where it sat
23 in relation to other claimed elements, and how it
24 interacted with those claim elements to achieve a
25 claim-recited objective.

1 In that regard, this case -- well, I would also
2 mention that in Digital Retail Apps, the claim at issue
3 specifically recites steps for. It had the words "steps
4 for." So it didn't have the presumption, as you would have
5 in this case, that 112(f) does not apply.

6 This case is more like the -- this Court's prior
7 decision in Ancora Tech, where it found a particular piece
8 of software on a particular piece of hardware designed for
9 a particular purpose to connote sufficient structure to a
10 person of ordinary skill in the art, such that it avoided
11 the ambit of 112(f) and maintained the presumption.

12 And with that, I will pass.

13 THE COURT: Okey-dokey. Anything else from
14 Microsoft?

15 MR. DAYBELL: No, Your Honor.

16 THE COURT: Okay. I'll be back in a few seconds.

17 (Pause in proceedings.)

18 THE COURT: Let's go back on the record.

19 The Court is going to maintain its preliminary
20 construction and make it its final order.

21 Let me ask you this, Mr. Flynn, just because
22 you're in my picture, a particular spot, do you know
23 whether or not we have given you-all a trial date?

24 MS. DE MORY: I believe, yes.

25 MR. FLYNN-O'BRIEN: Yes, Your Honor, you have.

1 THE COURT: And can you tell me when -- what month
2 that is?

3 MR. FLYNN-O'BRIEN: Again, if you give me a
4 second.

5 THE COURT: Or anyone can jump in. I --

6 MS. GILBERT: Your Honor, it is November 14th,
7 2022.

8 THE COURT: Okay. Give me just a second and let
9 me make sure that that -- that that is actually a good
10 date, but it sounds to me like it probably will work. Just
11 give me a second to verify that, and I'll be right back.

12 MR. FLYNN-O'BRIEN: Thank you.

13 (Pause in proceedings.)

14 THE COURT: Okay. Gentlemen and ladies, that date
15 works for us.

16 I'll start with the Plaintiff, is there anything
17 else that we need to take up?

18 MR. FLYNN-O'BRIEN: No, Your Honor. Thank you.

19 THE COURT: And for Defendants?

20 MR. BOBROW: No, Your Honor. This is Jared
21 Bobrow. I think that is it.

22 THE COURT: It was a pleasure to have all of you.
23 It's an amazing level of talent I see in -- day in and day
24 out arguing these.

25 The work that you-all did -- I know my technical

1 advisor told me the briefs were really, really good in this
2 case, and they were very helpful.

3 And as usual, what's amazing is how you-all did
4 essentially average performances for the lawyers I have,
5 which means they were all terrific. So I appreciate the
6 great lawyering that we had today.

7 Take care. And I look forward to seeing some of
8 you, I hope, in the not-too-distant future here in Waco.

9 Take care.

10 (Hearing concluded 3:50 p.m.)

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CERTIFICATION

3 I HEREBY CERTIFY that the foregoing is a true and
4 correct transcript from the stenographic notes of the
5 proceedings in the above-entitled matter to the best of my
6 ability.

9 /S/ Shelly Holmes
0 SHELLY HOLMES, CSR, TCRR
1 CERTIFIED SHORTHAND REPORTER
1 State of Texas No.: 7804
1 Expiration Date: 10/31/2023

11/8/2021
Date